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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EVOLUTIONARY INTELLIGENCE,  
LLC,  
  
Plaintiff,  
  
v.  
  
YELP, INC.,  
  
Defendant.

Case No. 5:13-cv-3587-DMR  
  
**Plaintiff's Statement of Consent to  
Consolidation**

EVOLUTIONARY INTELLIGENCE,  
LLC,  
  
Plaintiff,  
  
v.  
  
APPLE INC.,  
  
Defendant.

Case No. 3:13-cv-4201-JD

1	EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 3:13-cv-4202-SI
2		
3	Plaintiff,	
4	v.	
5	FACEBOOK, INC.,	
6	Defendant.	
7	EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 3:13-cv-4203-MMC
8	Plaintiff,	
9	v.	
10	FOURSQUARE LABS, INC.,	
11	Defendant.	
12	EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 3:13-cv-4204-SI
13	Plaintiff,	
14	v.	
15	GROUPON, INC.,	
16	Defendant.	
17	EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 3:13-cv-4205-WHO
18	Plaintiff,	
19	v.	
20	LIVINGSOCIAL, INC.,	
21	Defendant.	
22	EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 5:13-cv-4206-EJD
23	Plaintiff,	
24	v.	
25	MILLENNIAL MEDIA, INC.,	
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Defendant.	
EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 3:13-cv-4207-JSW
Plaintiff,	
v.	
TWITTER, INC.,	
Defendant.	
EVOLUTIONARY INTELLIGENCE, LLC,	Case No. 5:13-4513-RMW
Plaintiff,	
v.	
SPRINT NEXTEL CORP., et al.,	
Defendant.	

**PLAINTIFF’S STATEMENT OF CONSENT TO CONSOLIDATION**

Plaintiff believes that consolidation is necessary to avoid the significant inefficiencies that would be guaranteed by proceeding with these cases separately. These nine cases are currently assigned to eight different judges. Unless the cases are consolidated, each of the eight judges will need to gain extensive familiarity with the asserted patents, each of which is significantly more complex than the average patent. To do so, each of the eight judges will need to review the prosecution histories of the patents, as well as the Patent Office’s written decisions in each of the eight petitions for *inter partes* review. Each of the eight judges will also need to independently determine whether each of the asserted claims are invalid in light of the same prior art references that will be submitted by the defendants. (It is nearly certain that the defendants will assert identical prior art references.)

1 More importantly, consolidation is necessary to ensure that claim  
2 construction is handled efficiently and that different judges do not adopt  
3 inconsistent constructions of claim terms. In these cases, the exact same  
4 independent claims of the '536 patent (claims 1, 2, 15, and 16), as well as  
5 independent claims 1 and 19 of the '682 patent, are asserted against *all* the  
6 defendants. Accordingly, at a minimum, *every* case will involve the  
7 foundational claim terms “container,” “register,” and “gateway,”  
8 “information element,” “active space register,” “passive register,” “neutral  
9 space register,” “historical data,” and “encapsulated/encapsulating.” It would  
10 be inefficient for eight different judges to construe these terms, and it would be  
11 far worse if two or more judges were to adopt inconsistent constructions for  
12 any term. Further, there is no need for Evolutionary Intelligence’s counsel to  
13 attend eight or nine separate claim construction hearings and argue for the  
14 same constructions eight or nine times.

15 This is not a situation where many different claims are asserted against  
16 different defendants. As shown in the chart attached as **Exhibit A**, there is  
17 significant overlap in the claims that are asserted against the defendants. For  
18 example, as the chart shows, there is no claim that is asserted against any  
19 defendant that is not also asserted against at least two other defendants. (*See*  
20 *Ex. A*.) In addition, as the chart shows, *all* claims that are asserted against any  
21 defendant are being asserted against Apple, Facebook, and Twitter. (Put  
22 another way, there are no claims that are asserted against any defendant that  
23 are not also being asserted against Apple, Facebook, and Twitter.) Accordingly,  
24 any judge who handles any of these three cases will necessarily grapple with all  
25 the claims that are asserted in each of these nine cases.

1 Consolidation would also result in efficient and uniform treatment of  
2 discovery issues. There is no need for eight separate protective orders to be  
3 negotiated, briefed, and entered by different judges. Nor is there any need for  
4 nine different schedules, or nine different orders regarding discovery rules.  
5 Further, because Evolutionary Intelligence will seek to review source code in all  
6 of these cases, efficiency would be served by having the same judge resolve the  
7 disputes that typically arise regarding source code review.

8 It is generally true that the defendants have different products. But that fact  
9 only further shows why consolidation is important. It would be wasteful and  
10 unfair for eight judges to apply eight somewhat different understandings of the  
11 asserted patents to different accused products. It would be much more fair and  
12 efficient for one judge to become familiar with the asserted patents, and to  
13 apply that understanding to the accused products uniformly.

14 Further, two of the pending cases—those against Sprint and Apple—  
15 involve the exact same accused Apple products. As explained in detail in  
16 Plaintiff’s Motion to Consolidate Cases for All Purposes, which is fully briefed,  
17 both Apple and Sprint use the CoreLocation framework of Apple’s iOS  
18 operating system in an infringing manner. (*See Innovative Automation v.*  
19 *Sprint*, Dkt. No. 31 at 5.) In addition, Sprint further infringes the asserted  
20 patents by selling Apple’s iOS devices. (*See id.*) Once these two cases have been  
21 consolidated—as they should be—the judge overseeing those cases will need to  
22 address claims 1–16 of the ’536 patent, and claims 1–11 and 14–23 of the ’682  
23 patent. These claims include every claim asserted against any defendant in these  
24 cases.<sup>1</sup>

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26 <sup>1</sup> Claims 12 and 13 of the ’682 patent are not asserted against any defendant.  
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1 Further, the history of these cases shows that they can easily be  
2 consolidated, with gains in efficiency. When these nine cases were filed in  
3 October 2013, they were all assigned to the same judge in the Eastern District  
4 of Texas. Since that time, the defendants have collaborated extensively in these  
5 cases. For example, the parties collaborated to submit a joint case management  
6 statement, an agreed order regarding electronic discovery, and a detailed joint  
7 protective order brief that raised a number of difficult issues. (*see Evolutionary*  
8 *Intelligence v. Apple*, Dkt. No. 84.) Further, as confirmed by the decision of  
9 Apple, Facebook, Yelp, and Twitter to file eight petitions for *inter partes*  
10 review of the asserted patents at the last possible moment before the one-year  
11 deadline, the defendants have collaborated significantly regarding the collection  
12 of prior art and the strategy to invalidate the asserted patents.<sup>2</sup> Indeed, Yelp  
13 and Twitter filed a joint *inter partes review* petition, and are represented by the  
14 same counsel, who throughout this litigation have filed nearly identical briefs  
15 on their behalves.

16 The defendants who oppose consolidation do so not because they truly  
17 believe that consolidation would be inefficient, but because they fear that the  
18 Court may, after consolidating these cases, lift the stays that are currently in  
19 place. Indeed, the only defendants that consent to consolidation (Yelp and  
20 Twitter) filed consent statements devoted to arguing that the stays should  
21 remain in place if the cases are consolidated. (*Evolutionary Intelligence v. Yelp*,  
22 Dkt. No. 117; *Evolutionary Intelligence v. Twitter*, Dkt. No. 114.) Likewise,  
23 LivingSocial, who “does not generally oppose consolidation,” nevertheless  
24 opposes consolidation in this case now because “[t]here is no basis at this time

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25 <sup>2</sup> Seven of the eight petitions have been rejected outright by the Patent Office,  
26 with the remaining petition having been rejected in part.  
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1 to overrule or second-guess two written orders to stay this case ...”

2 (*Evolutionary Intelligence v. LivingSocial*, Dkt. No. 108.)

3 The status of the stays in these cases, however, is yet another reason that  
4 they should be consolidated. At present, it appears likely that the stay in  
5 *Millennial Media* will be lifted. On June 10, Judge Donato conditionally  
6 granted Millennial Media’s motion to stay. The condition was “Millennial’s  
7 agreement to be bound by the same estoppel that limits IPR petitioners as set  
8 forth by 35 U.S.C. § 315(e).” (*Evolutionary Intelligence v. Millennial Media*,  
9 Dkt. No. 126 at 10.) The Court cautioned Millennial Media that “absent full  
10 consent, the court may sua sponte reconsider this Order.” (*Id.* at 10.)  
11 Millennial Media, however, filed a brief expressly refusing to comply with the  
12 condition that the Court imposed. (*Id.* at Dkt. No. 127.) In addition, in  
13 *Evolutionary Intelligence v. Sprint*, Judge Whyte issued an order requiring the  
14 parties to submit briefing regarding whether the stay should be lifted, in light of  
15 the fact that the Patent Office rejected seven of the eight *inter partes review*  
16 petitions. (See Dkt. No. 131.) The matter is now fully brief, but has not yet  
17 been determined. Finally, other than in the *LivingSocial* case, the judges  
18 presiding over the remaining cases have not yet determined whether the stays  
19 should be lifted in light of the Patent Office’s recent decision to reject all but  
20 one of the *inter partes* review petitions. Plaintiff believes it would be most  
21 efficient for one judge to determine, once and for all, whether the cases should  
22 move forward or continue to be stayed.

23 For these reasons, Plaintiff consents to consolidation of the above-  
24 captioned cases.

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Respectfully submitted,

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